Filed 7/29/02 P. v. Acevedo CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

YSIDRO GUELLERMO ACEVEDO,

Defendant and Appellant.

F039004

(Super. Ct. No. SC082343A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Richard J. Oberholzer, Judge.

Shama Mesiwala, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Jeffrey D. Firestone and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Dibiaso, Acting P. J., Harris, J. and Wiseman, J.

STATEMENT OF THE CASE

On August 3, 2001, a second amended information was filed in Superior Court of Kern County charging appellant Ysidro Guellermo Acevedo with count I, felon in possession of a .25-caliber handgun (Pen. Code,[1] § 12021, subd. (a)(1)); count II, felon in possession of a .380-caliber handgun; count III, felon carrying a loaded .25-caliber handgun (§ 12031, subd. (a)(2)(A)); count IV, felon carrying a loaded .380-caliber handgun; and count V, felon in possession of ammunition for .25-caliber and .380-caliber handguns (§ 12316, subd. (b)(1)). As to all counts, it was also alleged appellant suffered three prior serious and/or violent felony convictions within the meaning of the three strikes law (§ 667, subds. (c)-(j), § 1170.12), and served two prior prison terms (§ 667.5, subd. (b)). Appellant pleaded not guilty and denied the special allegations.

Thereafter, appellant's jury trial began. The court granted appellant's motion to bifurcate the special allegations. Appellant stipulated he was a convicted felon. Appellant was convicted on all counts as charged, and the jury found all special allegations true.

On September 11, 2001, the court denied appellant's motion to dismiss his prior strike convictions, and found circumstances in aggravation. As to counts I through V, the court imposed the third strike terms of 25 years to life. The court ordered the terms for counts I, II, and V to run concurrently, and stayed the terms for counts III and IV pursuant to section 654. The court also imposed two consecutive one-year terms for the prior prison term enhancements.

On September 19, 2001, appellant filed a timely notice of appeal.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

FACTS

On April 5, 2001, at approximately 10:26 p.m., Kern County Deputy Sheriff Todd Bishop was on patrol near the intersection of Delfino and Belle Terrance Streets. As he approached the intersection, he observed appellant walking unsteadily in the roadway. Appellant's gait was very unsteady as he walked in and out of the center of Delfino Street. Deputy Bishop believed appellant was under the influence of alcohol, and parked his patrol car a few yards ahead of appellant's position. Deputy Bishop stepped out of the patrol car and waited for appellant to walk by, and noticed a second man was also walking with appellant.

When the two men approached the patrol car, Deputy Bishop asked if he could speak with them. The second man immediately stopped at the patrol car, but appellant continued to walk. Appellant kept his head down and looked at a cell phone in his hand, and walked away from the patrol car. Appellant glanced up and looked at Deputy Bishop, then ran northbound on Delfino Street.

Deputy Bishop left the second man standing by the patrol car, ran after appellant, and called for backup assistance. Bishop repeatedly identified himself and ordered appellant to stop, but appellant continued to run past residences on Delfino Street. Appellant ran into a driveway and tried to jump a chain link fence that was six to seven feet high. Appellant partially climbed the fence, and Deputy Bishop saw an object fly out of his hands. Appellant lost his grip on the fence and fell down into the driveway. He turned around and faced Bishop, who was right behind him. Bishop drew his baton and ordered appellant to the ground, but appellant jumped to his left, ran between two parked cars to avoid Bishop, and then ran away.

Deputy Bishop continued to pursue appellant and eventually caught up to him. Appellant turned and realized Bishop was about to reach him, and he suddenly stopped running. Bishop drew his handgun and ordered appellant to the ground. Appellant

complied and laid on his stomach. Bishop held appellant at gunpoint until backup units arrived, then placed him in handcuffs as he remained on the ground.

Deputy Bishop rolled appellant onto his right side and conducted a patdown search. Appellant was wearing a long jacket. Bishop found an empty brown leather holster on appellant's waistband, near his belt buckle, which had been covered by the jacket. Bishop asked appellant where the gun was. Appellant replied it was on his leg. Bishop then found a silver Raven Arms MP .25-caliber semi-automatic handgun in an ankle holster on appellant's right ankle. The weapon was loaded and operable. The magazine contained six rounds of full metal jacket .25-caliber ammunition, but there was no round in the chamber.

Deputy Bishop compared the .25-caliber handgun with the empty holster on appellant's waist, and realized the gun could not fit into the holster. Bishop retraced the pursuit route, and examined the area near the chain link fence that appellant tried to jump. On the other side of the fence, Bishop found a cell phone and a Lorcin .380-caliber semi-automatic handgun. The .380-caliber handgun was operable and the magazine was fully loaded with seven .380-caliber hollow point rounds, but there was no round in the chamber. Bishop determined the .380-caliber handgun fit into the holster on appellant's waist.

Deputy Bishop further determined appellant was under the influence of alcohol because his speech was slurred, his eyes were bloodshot, and his breath had the odor of alcohol. The second man who was walking with appellant disappeared from the area and was never found.

Deputy Bishop placed appellant in his patrol car and transported him to jail. During the trip, appellant asked what he was being arrested for. Bishop replied that he wasn't sure, but he would probably be charged with being a felon in possession of a loaded firearm. Appellant asked "how many felonies that was." Bishop again said that he wasn't sure and could give him a better idea once they arrived at the jail. Appellant

then asked if he was going to be charged with a felony for having both guns. Bishop replied that each gun carried a separate felony count. Bishop testified appellant hung his head down and said: "I fucked up, man, just plain fucked up--out fucking drinking, getting stupid."

When they arrived at the jail, Bishop advised appellant of the warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, and appellant said he didn't want to talk to Bishop. However, appellant asked Bishop if he was the officer who chased him. Bishop replied that he was, and appellant "was very apologetic. He said he wanted to apologize for the whole thing, said he was out drinking and being stupid."

Appellant was convicted of all charged offenses and sentenced to the third strike term of 25 years to life. On appeal, he contends the jury was not properly instructed on the elements of count V, possession of ammunition by a felon. Appellant also contends the court should have stayed the third strike term for count V instead of running the term concurrent to the other sentences.

DISCUSSION

I.

APPELLANT WAS PROPERLY CONVICTED OF COUNT V

Appellant contends his conviction in count V for being a felon in possession of ammunition must be reversed because the jury was not properly instructed as to the elements of this offense. Appellant's argument is based on the court's misstatement of the final sentence of the instruction for count V. However, our review of the entirety of the record reflects appellant was properly convicted of this charge.

A. Background

In count V, appellant was charged with being a felon in possession of ammunition for .25-caliber and .380-caliber handguns, in violation of section 12316, subdivision (b)(1). This statute states:

> "No person prohibited from owning or possessing a firearm under Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code shall own, possess, or have under his or her custody or control, any ammunition or reloaded ammunition." (§ 12316, subd. (b)(1).)

At the start of trial, the court read the information to the jury, including the allegations for count V:

> "Count five. On or about April 5, 2001, [appellant] did willfully and unlawfully own or have in his possession or under his control *ammunition*, to wit: .25 caliber and .380 caliber handgun ammo, violation of Penal Code Section 12316(b)(1), a felony, having previously been convicted of a felony." (Italics added.)

As set forth above, Deputy Bishop testified that both the .25- and .380-caliber weapons were fully loaded with ammunition. The defense did not present any evidence, except for cross-examination as to the objects which appellant allegedly threw as he tried to climb the fence.

In closing argument, the prosecutor specifically defined the evidence as to each count. As to count V, the prosecutor stated:

> "The fifth count is violation of [section] 12316 of the Penal Code. That's a violation of possession of ammunition by [an] ex-felon, and that is in relation to both the bullets that were found that were loaded into the .380[-caliber] and the bullets that were loaded into the .25[-caliber]."

The prosecutor argued the entire case depended upon whether the jury could find appellant was in possession of both the .25- and .380-caliber weapons, and such a determination was the basis for all the charged offenses.

> "In regards to the count of the possession of the ammunition, obviously that goes along with the other ones. These are all pretty much dovetailed. You could pretty much find if he was in possession of a .25 caliber, he was in possession of the ammunition in the .25 caliber. [¶] Same true for the .380. If you find he was in possession of the .380, also true that that .380 was loaded, operable, and the ammunition in that gun is what will sustain your finding of him to be guilty of [section] 12316, felony possession of ammunition."

Defense counsel's closing argument was limited to the assertion the prosecution failed to prove the truth of every allegation beyond a reasonable doubt, without any specific assertions or attacks upon the evidence.

At the conclusion of the argument, the court read "SPECIAL INSTRUCTION # 2" to the jury to define the elements of count V. The printed instruction correctly used the word "ammunition" in all relevant sentences. However, the court read the following version of this instruction:

> "[Appellant] is accused in count five of having violated section 12316(b)(1) of the Penal Code, a crime.
>
> "Every person who, having previously been convicted of a felony, who owns, possesses or has under his control or custody any *ammunition* is guilty of violating Section . . . 12316(b)(1) of the Penal Code, a crime.
>
> "In this case the previous felony conviction has already been established by stipulation so that no further proof of that fact is required. You must accept as true the existence of this previous felony conviction.
>
> "Again, there are two kinds of possession: Actual possession and constructive possession.
>
> "Actual possession requires that a person knowingly exercise direct physical control over a thing.
>
> "Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons.
>
> "One person may have possession alone or two or more persons together may share actual or constructive possession.
>
> "In order to prove this crime, each of the following elements must be proved:
>
> "One, [appellant] had in his possession or had under his control a *firearm*, and; two, [appellant] had knowledge of the presence of the *firearm*." (Italics added.)

The court thus mistakenly used the word "firearm" instead of "ammunition" in the last paragraph of the definitional instruction for count V. After the court read all the instructions to the jury, it asked the parties if there were any objections. Neither the prosecutor nor appellant objected to any of the instructions. The court informed the jury that it could review the printed instructions, but there is no indication in the record that the printed instructions were sent into the jury room during deliberations.

Thereafter, the jury returned a guilty verdict on all counts. As to count V, the foreperson signed the following verdict form:

> "We, the jury, empaneled to try the above entitled cause, find [appellant] guilty of Felony, to wit: Possession of Ammunition by Felon, in violation of section 12316(b)(1) of the Penal Code, as charged in the Fifth count of the Information."

Appellant did not raise any objections to the court's mistaken use of the word "firearm" instead of "ammunition" in the last paragraph of the special instruction for count V.

B. Analysis

Appellant points to the court's mistaken use of the word "firearm" in the last paragraph of the special instruction, and contends his conviction in count V must be reversed because the jury was not instructed as to the elements of the offense.

The correctness of jury instructions is to be determined from the entire charge of the jury, not from a consideration of parts of an instruction or any particular instruction. (*People v. Wilson* (1992) 3 Cal.4th 926, 943.) We must consider the instructions as a whole, and assume the jurors are intelligent persons capable of understanding and correlating all jury instructions which are given. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80.) The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole. (*People v. Bolin* (1998) 18 Cal.4th 297, 328.)

A judgment of conviction cannot be entered unless the jury expressly finds against the defendant upon the particular issue presented by the charging information, as

reflected in the verdict forms. (*People v. Crowell* (1988) 198 Cal.App.3d 1053, 1064.) Every error, however, does not require reversal. (*Ibid.*) In the absence of a showing of prejudice in the record, or of prejudicial inadequacy in its content, this court must acknowledge "the repeatedly declared policy of this state relating to criminal appeals," as set forth in several statutes. (*People v. Chessman* (1950) 35 Cal.2d 455, 462.)

Section 1404 states: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right." Section 960 also provides: "No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits." Section 1258 similarly declares: "After hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties."

The jury must make a determination as to the defendant's guilt or innocence with respect to the crime charged in the information, and if its statement is in doubt, the court must construe it in light of the entire record of the proceedings and the instructions. (*People v. Lovely* (1971) 16 Cal.App.3d 196, 203.) A verdict must be read in light of the facts disclosed by the record. The court must construe it to give it the effect intended by the jury, if that effect can be ascertained from its language in connection with the pleading and the evidence. (*People v. Barraza* (1988) 197 Cal.App.3d 613, 617-618.)

In the instant case, the entirety of the record reflects the jury's unmistakable intent to convict appellant of count V, possession of ammunition by a felon. The information was read to the jury on the first day of trial and alleged in count V that appellant, an ex-felon, possessed .25- and .380-caliber ammunition in violation of section 12316, subdivision (b)(1). The trial evidence established that appellant possessed both .25-

caliber and .380-caliber semi-automatic handguns, and both handguns were loaded with the respective ammunition. The verdict form correctly defined the offense charged in count V. The prosecutor clarified the evidence applicable to each count, and specified that count V was based on appellant's possession of the ammunition inside both guns. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 139.)

As for the special instruction, the printed form correctly defined the elements of count V, but there is no indication the printed instructions were sent into the jury room during deliberations. However, the court correctly read the introductory paragraphs of the special instruction, which informed the jury that count V was based on appellant's possession of ammunition: "[Appellant] is accused in count five of having violated section 12316(b)(1) of the Penal Code, a crime. [¶] Every person who, having previously been convicted of a felony, who owns, possesses or has under his control or custody any *ammunition* is guilty of violating Section . . . 12316(b)(1) of the Penal Code, a crime." (Italics added.) The instruction correctly defined actual and constructive possession, which were relevant issues given appellant's attempt to discard the fully loaded .380-caliber handgun during the foot pursuit.

Appellant insists the jury was instructed on the "wrong crime" for count V, and the court "misdescribed all of the elements of the offense." Appellant further asserts the jury did not have "the correct legal guidelines" to find him guilty of count V, and this court cannot speculate about whether a properly instructed jury could have found the "omitted elements" beyond a reasonable doubt. Appellant's claim of constitutional error is based on the court's mistaken use of the word "firearm" instead of "ammunition" in the final paragraph of the special instruction for count V.

Given the entirety of the record, however, the court's misstatement of a single word cannot be relied upon to nullify the verdict in count V, and appellant's claims of prejudice must be rejected. No objections were made at trial as to the court's misstatement, even though the court invited the parties to lodge any final objections to

the instructions as given. The verdict form for count V correctly defined the offense as possession of ammunition. In addition, the court's erroneous misstatement was "so obvious" that there is no reasonable likelihood the jury, "with its members deliberating the charges, would have understood" that possession of ammunition is defined as possession of a firearm. (*People v. Osband* (1996) 13 Cal.4th 622, 688.)

The verdicts in counts I through IV reflect the jury's determination that appellant was an ex-felon who possessed the .25- and .380-caliber handguns, both weapons were loaded with ammunition, and its rejection of any attempt by appellant to disclaim possession of the two loaded firearms. The record thus unmistakably reflects the jury's intent to further convict appellant of possession of .25- and .380-caliber ammunition, and there is no reasonable probability the outcome of appellant's trial would have been different had the court correctly used the word "ammunition" instead of "firearm" in the last sentence of the special instruction.

II.

THE SENTENCE IN COUNT V

Appellant contends, and respondent concedes, the trial court erroneously imposed a concurrent term of 25 years to life for count V. Respondent concedes the term for count V should have been stayed pursuant to section 654.

DISPOSITION

The judgment as to count V is ordered modified to reflect the sentence for count V, 25 years to life, is stayed pursuant to Penal Code section 654. As so modified and in all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and provide a copy thereof to all appropriate authorities.